

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
November 29, 2006 Session

**STATE OF TENNESSEE v. STACEY JOE CARTER**

**Appeal from the Circuit Court for Robertson County  
No. 05-0002     John H. Gasaway, Jr.**

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**No. M2005-02784-CCA-R3-CD - Filed March 7, 2007**

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The defendant, Stacey Joe Carter, was convicted by a Robertson County jury of vehicular homicide, a Class C felony, and driving on a suspended license, a Class B misdemeanor. The trial court imposed an effective sentence of ten years as a Range III, persistent offender to be served on probation. The state now appeals the imposition of sentence, arguing that the trial court abused its discretion in imposing the minimum sentence to be served on probation. Upon a full review of the record, arguments of counsel and applicable law, we agree and reverse the judgment of the trial court and remand the case for entry of judgment consistent with this court's opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is  
Reversed; Case Remanded**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; Dent Morriss and Jason White, Assistant District Attorneys General, for the appellant, State of Tennessee.

Roger Nell, District Public Defender; Charles S. Bloodworth, Sr., Assistant District Public Defender, for the appellee, Stacey Joe Carter.

**OPINION**

The defendant, Stacey Joe Carter, was convicted of vehicular homicide involving the death of his fifteen-year-old nephew, Michael Allen Carter. On October 24, 2004, Matthew Donezal, a narcotics officer with the Guthrie Kentucky Police Department, observed the defendant's Nissan Sentra stopped in a known high drug-crime area. The defendant was talking with a black male who was known to Officer Donezal as a drug dealer. Officer Donezal testified that the defendant's

vehicle sped away as soon as the defendant saw him. He recalled that the defendant drove erratically in his attempts to evade him. He stated that the defendant refused to stop when he activated his blue lights. The officer stated that he considered the defendant to be driving recklessly throughout the pursuit and that his speed escalated to between fifty-five and sixty miles per hour. The pursuit began in Kentucky approximately two hundred yards from the Tennessee state line and ended when the defendant lost control of his vehicle on a curve on Mint Creek Road in Robertson County, Tennessee. At that time, the vehicle left the roadway and came to a stop upside down in the Red River. The defendant emerged from the driver's side and attempted to flee. When officers asked for help to rescue the victim from the sinking vehicle, his only reply was "F[\*\*\*] you!" The defendant was quickly apprehended.

Steven Ellis of the Guthrie Volunteer Fire Department testified that he arrived on the scene to find the defendant's vehicle submerged in shoulder-height water. He stated that officers were attempting to break open the window and door to remove the victim. He recalled using a fire axe to break open the window, unlock the door and remove the victim. By this time, approximately thirty minutes had passed since the accident and emergency personnel were unable to resuscitate the victim. Dr. Charles Harlan, the medical examiner who performed the victim's autopsy, testified that the fifteen-year-old victim died from drowning. He further related that the victim had a blood alcohol content of .243% and that an individual his size would have to consume "essentially a case of beer" to reach that level of intoxication.

Based upon this evidence, the jury convicted the defendant of vehicular homicide. At the sentencing hearing, the trial court considered the presentence report and arguments of counsel regarding various sentencing considerations. Additionally, the court considered a substantial amount of victim impact information from family members asking that the defendant be sentenced to probation "because he had suffered enough" over the victim's death. Both the state and the defendant agreed that the defendant should be sentenced as a Range III, persistent offender based upon his history of qualifying prior convictions. However, the defendant argued that he should be given the minimum sentence to be served on supervised probation because the victim's death occurred "not solely through [the defendant's] own actions but through the actions of others." In arriving at its sentencing determination, the trial court stated:

Mr. Stacey Carter was indicted and convicted for his acts, but others were not. They were acting without – without – outside their jurisdiction. They were not chasing a fleeing felon. They should not have done what they did. It was wrong. And the conduct of the officers in conjunction with Mr. Carter caused the death of Michael Carter. That's important when it comes to figuring out what to do with Stacey Carter.

In light of the length of time that he has served in confinement, in light of the likelihood that further confinement would serve any purpose of – toward rehabilitating Mr. Stacey Carter as it pertains to the death of Michael Carter, in light of the family's view, and in light of the whole situation and why Michael Carter is

dead it would be – it is justice to grant the Defendant’s motion, and the Court sentences him to ten years, time served, probated, consecutive [to Kentucky and other charges] as requested.

The state now appeals the trial court’s imposition of the minimum sentence and the grant of probation. Tenn. Code Ann. § 40-35-402(b)(2) and (7).

### ANALYSIS

When the state challenges the length, range or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-35-402(d). This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the defendant on his own behalf and (h) the accused’s potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-103, -210; State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-402, Sentencing Commission Comments; Ashby, 823 S.W.2d at 169. If this court determines that the sentence is erroneous, it “may affirm, vacate, set aside, increase or reduce the sentence imposed or remand the case or direct the entry of an appropriate order.” Tenn. Code Ann. § 40-35-402(c).

The sentencing hearing transcript reveals that the defendant committed the offenses in October 2004 but elected to be sentenced according to the provisions of Tennessee Code Annotated Section 40-35-210 (2006)(effective June 7, 2005). The trial court determined the defendant to be a Range III, persistent offender for the vehicular homicide conviction based upon his history of previous convictions. The defendant agreed with his range classification but argued that he should receive the minimum sentence to be served on probation. The state argued that three enhancement factors should apply to increase the defendant’s sentence beyond the statutory minimum: (1) that the defendant has a history of criminal convictions in addition to that necessary to establish the range, (2) that the offense was committed while the defendant was on parole from a Kentucky conviction and (3) that the offense was committed while the defendant was on probation from a Robertson County conviction. Tenn. Code Ann. § 40-35-114(1),(13)(B) and (13)(C).

The trial court imposed the minimum sentence with full probation based upon its finding that the Kentucky police officers were equally culpable in the death of the victim, presumably under the catch-all mitigating factor of Tennessee Code Annotated Section 40-35-113(13). The trial court also gave great weight to the victim impact letters provided by family members who blamed the officers for the victim's death and felt that the defendant had suffered enough. The trial court made no mention of specific enhancement factors in arriving at its sentencing determination. It is also apparent from the record that the trial court did not give proper consideration to the sentencing considerations of Tennessee Code Annotated Section 40-35-103 in arriving at its decision to grant full probation. Otherwise, it is unlikely that the court would have imposed full probation for an offense committed while the defendant was on both parole and probation from other offenses. Tenn. Code Ann. § 40-35-103(1)(C).

The capstone of the trial court's sentencing determination is its finding that the officers were culpable in the death of the victim. However, the facts and circumstances do not support the trial court's finding. The Kentucky officers pursued the defendant only a few miles into our state before the fatal accident occurred. Furthermore, the pursuit occurred as a direct result of the officers' observation of a suspected drug transaction and the defendant fleeing from the scene and evading arrest in a wholly reckless manner. In this court's view, this erroneous finding cannot properly be the sole basis of the sentencing determination.

In conducting our *de novo* review, we find that the defendant's criminal history is lengthy and replete with failed attempts at rehabilitation. The presentence report details convictions beginning in 1989 and spanning over seventeen years occurring in both Kentucky and Tennessee. The history includes convictions for three second degree burglaries, two thefts, two passing worthless check offenses, an aggravated assault and a felon in possession of a weapon offense. Long before the present offenses were committed while on parole and probation, the defendant committed other offenses while on parole from his first convictions in Kentucky. After receiving an effective sentence of six years suspended to full probation in Robertson County for the worthless checks and aggravated assault convictions, the defendant failed to report to probation and returned to Kentucky. Finally in 2001, he was convicted in Kentucky of his most recent second degree burglaries, theft and weapon possession offenses and received an effective sentence of fifteen years. He was paroled in 2004 and committed the present offenses soon thereafter. At the time of sentencing, the defendant was facing a parole revocation in Kentucky. Despite the fact that victim impact letters urged the trial court to grant the defendant probation so that he could care for his minor children, the presentence report also reflects "holds" on the defendant for non-payment of child support. Additionally, the defendant admitted to a history of illegal drug use and alcohol abuse, although he claimed to be rehabilitated at the time of the presentence report.

In arriving at our sentencing decision, this court places great weight on the defendant's criminal history and failed attempts at rehabilitation. Therefore, we find three enhancement factors applicable: that the defendant has a previous history of criminal convictions or criminal behavior in addition to that necessary to establish the appropriate range; that the defendant, before trial or sentencing, has failed to comply with the conditions of a sentence involving release into the

community; and that the defendant committed the present offenses while on parole and probation. Tenn. Code Ann. § 40-35-114(1), (8), (13)(B) and (C). Furthermore, in consideration of the facts and circumstances of the case, the court also finds it significant that the defendant fled from the accident scene in an attempt to avoid arrest. In doing so, he left his extremely intoxicated fifteen-year-old nephew alone in a sinking vehicle. When the officers asked for the defendant's help to get his nephew out of the vehicle, the defendant's only reply was "F[\*\*\*] you." Because the trial court failed to appropriately adjust the sentence length due to the presence of enhancement factors and, as set out above, based the sentence on a mitigating factor not supported by the proof, the judgment of the trial court is reversed and the sentence is modified to fifteen years. Implicit in our ruling is a denial of probation because the modification renders the defendant no longer eligible. Tenn. Code Ann. § 40-35-303(a).

We also note that the judgment of conviction for driving on a suspended license, a Class B misdemeanor, reflects a sentence of ten years to be served on community corrections concurrent to the sentence imposed for the vehicular homicide conviction. Obviously, a sentence of ten years for a misdemeanor conviction is erroneous. The judgment further reflects an inaccurate jail credit of only five days from October 24, 2005, until October 28, 2005. Actually, based upon discussions during the sentencing hearing, the defendant had been incarcerated from the date of his arrest on October 24, 2004. For this reason, the defendant argued that his misdemeanor sentence had effectively already been served while awaiting trial. Apparently, the trial court treated the sentence as served, because there is nothing in the record to reflect that the trial court actually imposed a sentence regarding the misdemeanor conviction. It is also unclear who prepared the judgments for entry, but it is clear that the judgment for driving on a suspended license is incorrect. Therefore, upon remand, the trial court is directed to correct the judgment to reflect a sentence of six months, with accurate jail credit, to be served concurrent with the modified judgment of fifteen years for the vehicular homicide conviction.

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#### CONCLUSION

Pursuant to our *de novo* review, the judgment of the trial court sentencing the defendant to ten years as a Range III, persistent offender with probation is reversed and remanded for entry of judgment to reflect a sentence of fifteen years as a Range III, persistent offender. The judgment of conviction for driving on a suspended license shall be corrected to reflect a sentence of six months, with appropriate credit for time served, concurrent with the vehicular homicide sentence. Both sentences shall be served consecutively to the Kentucky sentence, as ordered by the trial court.

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D. KELLY THOMAS, JR., JUDGE